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Date: December 7, 2000
Case No. 1999-LHC-1679
OWCP No. 5-105205

In the Matter of:

ROBERT BURLEY,
Claimant
v.

TIDEWATER TEMPS, INC. ,
Employer
and

RELIANCE INSURANCE COMPANY
Carrier

DECISION AND ORDER

This proceeding involves a claim for temporary total disability from an injury alleged to have been suffered by Claimant. Robert Burley, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 948(a). (Hereinafter "the Act"). Claimant alleges that he was injured while shoveling sand into a wheelbarrow and moving it out of the area at Newport News Shipbuilding and Dry Dock Company while employed by Employer; and that as a result he is suffering from an aggravation of a pre-existing asymptomatic fracture in his left wrist.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held before the undersigned Administrative Law Judge on October 22, 1999. (Tr).[1] Claimant submitted three exhibits, identified as Cx 1- Cx 3, which were admitted without objection. (Tr at 17.) Employer submitted ten exhibits identified as Ex 1 through Ex 10. Exhibits Ex 2, Ex 5, Ex 6, Ex 7, Ex 9 and Ex 10 were admitted without objection. Exhibits Ex 3, Ex 4 and Ex 8 were not admitted as they were not exchanged in compliance with the pre-hearing order issued in this case, and the witnesses were not identified in discovery responses to the Claimant (Tr at 16, 26-28, 35-37, 68, 77, 90). The record was held open 60 days for briefs. Claimant filed a motion on December 21, 1999, requesting an extension until December 29, 1999, to file briefs stating that the

[1] Ex - Employer's exhibit; Cx- Claimant's exhibit; and Tr - Transcript.

Employer had no objection. An extension was granted until January 3, 2000. Claimant's brief was filed January 3, 2000, and Employer's was filed on January 4, 2000.

The findings and conclusions which follow are based on a complete review of the record and testimony in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The following issues are disputed by the parties:

1. Whether Claimant's injury to his wrist arose out of and in the course of his employment with the Employer.

2. The nature and extent of disability resulting from the injury.

STIPULATIONS

At the hearing, Claimant and Employer stipulated (Tr. 12, Claimant's brief, Employer's brief) that:

1. The parties are subject to the jurisdiction of the Act;

2. An employer/employee relationship existed at all relevant times;

3. The employee did file a timely claim for benefits for the alleged injury.

On December 6, 2000, Claimant indicated (by facsimile) that the parties had agreed that Claimant's average weekly wage was $163.36. (See Letter dated 12/6 /00).

DISCUSSION OF LAW AND FACTS

Section 20(a) of the Act provides claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once claimant has invoked the presumption, the burden of proof shifts to employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144.

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984); *Kelaita, supra*. Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989); *Kier, supra*. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697 (2d Cir. 1981); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. *Sprague v. Director, OWCP*, 688 F.2d 862 (1st Cir. 1982); *Holmes, supra*; *MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986).

At the hearing, Claimant said, in his opening statement, that the work Claimant was performing caused an aggravation of a preexisting asymptomatic condition in Claimant's wrist. (Tr at 8.) Employer later stated:

> Well, your Honor, I think that, given the status of this case and Mr. Burley's own testimony that he was working and he had some sort of injury, the possibility that it could have happened out of the work, as the statute reads, indicates that the presumption would be invoked, and we would have to rebut the presumption.

(Tr at 12.)

Therefore, I find that Employer conceded that the presumption of § 20(a) has been invoked. Thus, the parties have stipulated that Claimant has shown that he suffered an aggravation to a pre-existing, asymptomatic fracture in his left wrist and that conditions existed at work which could have caused this injury.

Since the presumption has been invoked, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that the claimant's employment did not cause, contribute to or aggravate his condition. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989); *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. *E & L Transport Co., v. N.L.R.B.*, 85 F.3d 1258 (7th Cir. 1996).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by § 20(a). *See Smith v. Sealand Terminal*, 14 BRBS 844 (1982). The evidence necessary to rebut the § 20(a) presumption is the unequivocal testimony of a physician that no relationship exists between the Claimant's disabling condition and the Claimant's employment. *Kier v. Bethlehem Steel Corp*., 16 BRBS 128, 129-130 (1984). When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's condition was not caused or aggravated by his employment. *Rajotte v. Genera Dynamics Corp.*, 18 BRBS 85 (1986).

Employer argues that the presumption is rebutted, based upon the testimony of Dr. Cavazos, (EX 1), and the report of Dr. Ellis (EX 9). Clearly, the opinion of Dr. Cavazos, that Claimant's wrist problem was aggravated by his work activities does not rebut the presumption of § 20(a). Dr. Cavazos's testimony, upon which Employer relies, is Dr. Cavazos's answer to the question, "Is it possible that he could have been working with this old, displaced, non-united fracture of the carpal navicular bone with displacement for years, " to which Dr. Cavazos answered, "Yeah. Like I just said, I don't know when that happened. I don't know when the displacement happened." (Tr at 39-40.)

However, in order to rebut the presumption, the evidence must unequivocally sever the connection between Claimant's injury and his employment. This testimony is equivocal and does not sever the connection between Claimant's injury and his employment.

Dr. Ellis's testimony is also insufficient to sever the connection. In a letter to Fara HealthCare Management, Dr. John Ellis stated that "the process appears to be not an injury, but a disease, as I pointed out in my 5/13/99 letter to your. Accordingly, I see no relationship between work and this claimed hand problem, and no logic to justify surgery for his pre-existing wrist fracture under any workers' compensation system. (Ex 9a.)

Dr. Ellis's letter dated May 13, 1999 states,

> My own impression, which I feel is far more likely, is that Mr. Burley had an acute episode of gout in his left wrist. The medication and rest would almost certainly aided in the resolution of a single episode. **I see no logic at all in the genesis of the old fracture of his left scaphoid as having anything to do with his work with a wheelbarrow, even if it were repetitive.** His degenerative arthritis symptoms may well have been made temporarily worse, but this is a usual result of repetitive motion. The bone was clearly fractured years earlier and degenerative arthritis was the expected result. Gout often precipitates in a locus of prior injury, and is notoriously of sudden onset, often waking some up from sleep or being present in the morning with acute pain, redness, and swelling that was not present on going to bed.
>
> **It is quite possible that repetitive trauma may exacerbate a prior problem and make it temporarily more noticeable**, but in this case, my opinion based on the

documentation provided, any surgery would be for pre-existing problems not related to his work. I see no evidence in the record of any recent trauma that explains his scaphoid fracture or the need for further definitive care. (Emphasis added).

(Ex 9b.)

Dr. Ellis's opinion states that the accident did not cause the initial fracture to Claimant's left wrist. It would sever the connection between Claimant's fracture and Claimant's employment, if that were at issue. It has been presumed under § 20, however, that the employment caused an aggravation to a pre-existing, asymptomatic fracture. Dr. Ellis agrees that the repetitive trauma might exacerbate a prior problem and make it temporarily worse. (Ex 9b.) Therefore, Dr. Elis's opinion also does not sever the connection between the displacement of the scaphoid fracture and Claimant's employment.

Assuming, *arguendo*, that Dr. Ellis's opinion was sufficient to sever the connection between Claimant's employment and his injury, Claimant meets the burden of showing by a preponderance of the evidence that the displacement of the fracture in his left scaphoid was work related.

In a letter dated November 10, 1998, Dr. Cavazos indicated that Claimant presented a two week history of pain that originated in the ulnar aspect of his left wrist and migrated to the radial side of the joint. (Cx 1v.) Claimant had developed marked swelling and effusion on the dorsum of his hand with the limited range of motion of the index finger. (Cx 1v.) Claimant indicated to Dr. Cavazos that his most recent activities included protracted use of a wheelbarrow. Lifting 300-400 pounds of sand in the performance of his job duties. (*Id*.) Despite the pain, Claimant continued to work until the point where he could no longer perform the requirements of his job. (*Id*.)

In the initial exam, Dr. Cavazos noted marked tenderness to palpitation of the metacarpal-phalangeal joint of the index finger, particularly the second metacarpal head. (*Id*.) He also had snuffbox tenderness and was tender to palpitation along the radial carpal joint to the ulnar side of the wrist. There was marked swelling on the dorsum of the wrist that covered the entire metacarpal region of the dorsum of the hand. Claimant was also markedly tender along the base of he metacarpals. (*Id*.) X-rays showed nonunion of the scaphoid fracture with markedly displaced fragments with the distal fragments possibly being necrotic. He had dramatic relief in his pain in the thumb spica short arm cast. Claimant was to remain immobilized for another 2 weeks to resolve the acute pain in his wrist and CMC joints of the left hand. (*Id*.)

Dr. Cavazos stated that it was his impression that Claimant's present condition was the result of his working and was the direct result of his heavy lifting using a wheelbarrow. (*Id*.) It is understood that the scaphoid fracture may have resulted for a previous episode of trauma, however, he was completely without pain until the recent past and the high degree of swelling in the wrist and the dorsum of the hand is of an acute nature and would indicated a recent trauma. (*Id*.) Dr Cavazos stated that at the very least, his protracted heavy lifting markedly exacerbated a previously existing nonunion of scaphoid fracture. (CX 1w.)

Dr. Ellis stated that he based this opinion (see *infra*) that Claimant suffered from gout on the fact that Claimant had no recent trauma on his visit to Riverside Express Care, Claimant himself thought the problem was gout, and that Claimant had an elevated uric acid, mild temperature elevation, and increased ESR of 30, which indicated an inflammatory process. Dr. Ellis felt that it was important that Claimant could not specify a date when he injured his wrist.

Claimant testified that he noticed the pain in his wrist during the second week he was working at Newport News Shipbuilding, (Tr at 45), but that he could not specify an exact date. This is supported by the notes of Dr. Cavazos, dated October 27, 1998, indicated that Claimant had told him that Claimant's pain began two weeks before the date of the exam, which would have been the week of October 13. (Cx 1y.) I find Claimant to be a credible witness, especially in light of the fact that his testimony is supported by the records of Dr. Cavazos.

Claimant testified that he thought his pain was related to his gout, (Tr at 47), which he had suffered on an almost annual basis for 13 years, (Tr at 47). It is possible that Claimant does not remember the date of the onset of pain because he thought it was gout, which, as Dr. Ellis describes it, is also, "notoriously of sudden onset." (Ex 9b.) If Claimant thought that his pain was gout, he would not necessarily tell his co-workers or his supervisor, either, because he knew gout would not be work-related. Therefore, I do not find the fact that Claimant did not remember the date the pain occurred is not as important a factor in determining work relatedness as Dr. Ellis.

In addition, Dr. Cavazos testified as follows concerning the suggestion that Mr. Burley's problems in his left wrist were caused by gout:

Q. Was his presentation on the 27th consistent with his problem being caused by gout?

A. I would say no; because in my experience, a gouty wrist is exceedingly painful, much like in the large toe or any other inflamed joint from gouty disease. It's- -any slightest range of motion causes exquisite tenderness. It's also warm to the touch. It's also erythematous. Of course, you do have the swelling which could go either way. I mean, the swelling is not specific, but it's that intense pain with any passive motion that is, in my opinion, a hallmark of gouty disease.

Q. All right. Was there anything or would anything on an x-ray tell you whether a particular problem was gout related?

A. If it's gout, you can see - there is - there are radiographic findings - specific radiographic findings for gout.

Q: Any of those in his particular case?

A: No.

(Cx. 2a at 6-7).

Dr. Cavazos also testified that Claimant did not respond to the gout medicine he was given in the Emergency Room.

> Q. Anything in those emergency room records that tell you anything more about his condition or would influence or change an in any way the opinions you have already given in this case?
>
> A. No, not really; because I mean basically he's saying the same thing. They put– they gave him a shot of Toradol, 60 milligram IM, and then they gave him Indocin, which is a common first-line drug for gout; and evidently, from the 23 rd of October to the time I saw him four days later, it's hard to quantify their swelling. It had not resolved by the time I saw him; and, usually, in a couple of days, with Indocin and a shot of Toradol, you would expect to see something–not necessarily, but you would think you would see something. Gout usually responds fairly well to Indocin.

(Cx 2a at 19-20.)

Regarding the relationship between the Claimant's condition in his left wrist and the work that he performed shoveling sand and moving it by wheelbarrow in September and October of 1998, Dr. Cavazos testified as follows:

> Q. What in you opinion or do you have an opinion as to the relationship between the work that Mr. Burley was doing, as he's described it shoveling and using a wheelbarrow before he carne to see you, and the development of the pain and problems in his left wrist?
>
> A. I think it was conceivable that, you know, the additional strength of - I mean the additional stress of, you know, using the wheelbarrow and repetitive motion may have been sufficient to dislodge the fragments sufficiently to reignite the synovitis or, you know, to deteriorate pseudoarthrosis down or to cause his pain. I mean, that I think is conceivable. I think I mean it's plausible what he told me what happened could be correlated.

(Cx. 2a at 14).

In his report of November 10, 1998, which was presented by Mr. Burley to his Employer, Dr Cavazos stated his opinion that, "It is my impression that Mr. Burley's present condition is a result of his working and is a direct result of his heavy lifting using a wheelbarrow. It is understood that the scaphoid fracture may have resulted from a previous episode of trauma; however he was completely without pain until the recent past, and the high degree of swelling in the wrist and dorsum of the hand is of an acute nature and would indicate recent trauma. At the very least, this protracted heavy lifting markedly exacerbated a previously existing nonunion of a scaphoid fracture." (CX 1 v-w). Dr. Cavazos further clarified his opinions contained in the November 10, 1998 letter in his deposition. Dr. Cavazos testified

Q. In your letter of November 10, 1998, you do, in fact, indicate that he had been without pain in the wrist until the recent past, which I guess you meant that at the point in time he developed the pain two weeks before he came into you office on the 27th, and that the high degree of swelling in the wrist and dorsum of the hand is of an acute nature and would indicate recent trauma, what do you mean by that? What's the significance of that?

A. Well, on that there- because he had been using - supposedly had been using the pain - I mean using his hand all along, he developed synovitis; and he could see the swelling in the dorsum of the wrist. The fact that he responded to immobilization was I think, in my opinion, further substantiate the fact that it was an acute injury and that, yeah, we got the synovitis to calm down, but we still have the underlying problems. If you had a fracture that at least had a pseudoarthrosis where there was some union of some regard and it wasn't causing any problem, all of a sudden it became swollen, most likely it was from synovitis, I mean l clearly think that's what it was from, a traumatic synovitis and then he got better, but you still had the pain. I mean it had resolved the acute, you know, traumatic swelling, but he still had the problem of a now painful nonunion, which he didn't have before.

Q. Okay. The recent trauma, then are you referring to the work that he had done with the wheelbarrow and shoveling?

A. As he relates it.

(Cx. 2a at 15-16.)

Dr. Cavazos clearly stated that once the Claimant's work activity had aggravated the preexisting problem in his wrist, the problems continued and ultimately lead to the surgery performed by Dr. Cavazos. Dr. Cavazos testified:

Q. Once aggravated by the work activity, the problems continued and led to the point you had to do surgery?

A. I would say that he had the acute problem, then had the subacute problem which was the nonunion of his fracture site.

Q. Okay. How does the - how does the work that he did and the aggravation caused by that relate to the continued problems in the nonunion site.

A. Well, because he still had pain, it is my opinion that, you know, he now had disrupted what at least had been some sort of provisional stabilization of his wrist, at least was functioning to some regard and didn't cause him symptoms and now it was causing him symptoms, so there's a basic change in the integrity of the anatomy. Something had to happen, okay?

(Cx. 2a).

I have no information on the record of the qualification of either physician.[2] There is a Dr. Daniel Cavazos of Hampton, VA listed as board-certified in Orthopaedic Medicine[3] on the American Board of Medical Specialties website. There are 23 Dr. John Ellis' listed on the website, but one, in Chantilly, VA, is listed as being board certified in occupational medicine. His signature on the report indicates that he is with Mary Immaculate Occupational Medicine. Thus, it will be assumed that Dr. Ellis is also board-certified.

There is, however, no indication that Dr. Ellis ever actually examined Claimant. His letter states that he reviewed Claimant's records, and he bases his opinion on "the documentation provided." No mention is made of an examination. (Ex 9.) Dr. Cavazos, on the other hand, examined Claimant several times over the course of several months, becoming intimately acquainted with the details of Claimant's injury. Therefore, I find that Dr. Cavazos's opinion as treating physician, is entitled to greater weight than Dr. Ellis's opinion as a doctor who merely reviewed the record. *Amos v. Director, OWCP,* 153 F.3d 1051 (9th Cir. 1998).

As Dr. Cavazos found that Claimant's displacement of the nonunion of the scaphoid fracture was the result of a work-related injury, I find that Claimant has shown by a preponderance of the evidence that his injury was work-related and is, therefore, compensable.

Nature and Extent of Disability

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. *See Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235, fn. 5 (1985); *Trask v. Lockheed Shipbuilding Construction Co.,* 17 BRBS 56, 60 (1985); *Stevens v. Lockheed Shipbuilding Company*, 22 BRBS 155, 157 (1989). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask v. Lockheed Shipbuilding & Construction Co.,* 17 BRBS 56, 60 (1985). Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record and is not dependant on economic factors. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

Claimant only requests temporary disability in this case. (Claimant's brief at 13). In addition, Dr. Cavazos indicated in his deposition testimony that Claimant had not reached maximum medical

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[2] Although the deposition of Dr. Cavazos indicates that Dr. Cavazos's curriculum vitae was to be enclosed as a deposition exhibit, it was not.

[3] Dr. Cavazos is board-certified in Orthopedic Surgery according to the American Board of Medical Specialties Certified Doctor Homepage <http:www.certifieddoctor.com/verify doc.asp>.

improvement. (Cx 2 at 34.). Although Dr. Ellis's opinion states that he believed that the work injury only caused a temporary exacerbation of a pre-existing problem, he offers no opinion as to whether Claimant reached maximum medical improvement. (Ex 9.) Therefore, his opinion is not helpful in determining the nature and extent of Claimant's disability.

It is not known whether Employer disputes the nature of Claimant's disability as Employer's brief concerns only the issue of causation and does not mention the issue of the nature and extent of Claimant's disability. Therefore, I find that Claimant has not reached maximum medical improvement. Thus, any compensation he receives will be temporary in nature. We must now turn to the nature of Claimant's disability.

Disability under the Act is an economic concept based upon a medical foundation. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Owens v. Traynor*, 274 F. Supp. 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. Consideration must be given to claimant's age, education, work experience, and whether he could obtain the work if he diligently tried. *Trans-State Dredging v. Benefits Review Board* (hereinafter *Tarner*), 731 F.2d 199 (4th Cir. 1984) (quoting *New Orleans Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981)). 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. *American Mutual Insurance Company of Boston v. Jones*, 426 F.2d 1263, 1266 (D.C. Cir. 1970).

Claimant has the burden of proving the nature and extent of his disability without the benefit of the § 20(a) presumption. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). However, once Claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing considering his age, education, work experience, and physical restrictions and which he could secure if he diligently tried. *Tarner*, 731 F.2d at 201; *Newport News Shipbuilding and Dry Dock v. Director, OWCP*,(hereinafter *Chappell*), 592 F.2d 762, 765 (4th Cir. 1979); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, he bears the burden of demonstrating his willingness to work once suitable alternative employment is shown. *Newport News Shipbuilding and Dry Dock v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988); *Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585 (1981); *Wilson v. Dravo Corp.*, 22 BRBS 463, 466 (1989); *Royce v. Elrich Construction Co.*, 17 BRBS 156 (1985).

As indicated, Claimant seeks temporary total disability. He testified that his job with Employer was to shovel the sand that had fallen onto the concrete area under the ship into a wheelbarrow, and remove it from under the ship, throw it out for the bobcat, then repeat the process. (Tr at 41-42.) The longest distance Claimant had to move the wheelbarrow was 50 feet. (Tr at 42.) Claimant stated that

there might also have been times when n the job involved moving heavy objects out of the way to facilitate the moving of sand. (Tr at 43.)

Dr. Cavazos advised Claimant to remain off work on October 27, 1998 and continued to advise him to remain off work at least as of Claimant's visit to him on August 30, 1999. (Cx 2a at 7, 12.) He testified that Claimant did not have sufficient strength or range of motion to return to manual labor. (Cx 2a at 13.) Thus I find that Claimant has established that he was unable to return to his usual employment.

Once Claimant establishes that he is unable to do his usual work, he has established a *prima facie* case of total disability and the burden shifts to Employer to establish the availability of suitable alternative employment which Claimant is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1032 (5th Cir. 1981). In order to meet this burden, Employer must show the availability of job opportunities within the geographical area in which he was injured or in which Claimant resides, which he can perform given his age, education, work experience and physical restrictions, and for which he can compete and reasonably secure. *Turner*, 661 F.2d at 1042-43; *Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 667, 671 (5th Cir. 1986); *Mijangos v. Avondale Shipyard, Inc.*, 19 BRBS 165 (1986).

No evidence is available in the record to show that suitable alternative employment was available for Claimant. Therefore, Employer has failed to carry its burden of showing suitable alternative employment and I find that Claimant was totally disabled due to Dr. Cavazos's opinion that Claimant was unable to return to his usual employment. Dr. Cavazos continued to advise Claimant to remain off work up to the date of the hearing, therefore, Claimant is entitled to temporary total disability from October 27, 1998 and continuing.

Order

Accordingly, it is hereby ordered that:

1. Employer, Tidewater Temps, Inc., is hereby ordered to pay to Claimant, Robert Burley, temporary total disability compensation at the rate of $108.91 per week ($163.36 X 2/3) from October 27, 1998 and continuing;

2. Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries;

3. Employer shall receive credit for any compensation already paid;

4. Interest at the rate specified in 28 U.S.C.§ 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

5. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

RICHARD E. HUDDLESTON
Administrative Law Judge